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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 1075

TENNESSEAN NEWSPAPERS, INC.,
Petitioner,

vs.

ROBERT G. VENN,
Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINION BELOW

No printed Opinion was filed by the Court of Appeals, its action being indicated by a two paragraph memorandum signed by Leslie R. Darr, a retired United States District Judge sitting by designation.

The basic Opinion, which was sought to be reviewed in the Circuit Court of Appeals for the Sixth Circuit was rendered by District Judge William Miller and is reported in 201 F. Supp. 47.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 6, 1963. The jurisdiction of this Court is invoked under U.S.C.A. § 1254.

QUESTIONS PRESENTED

The District Judge granted a judgment against Petitioner upon the theory that the publications of July 15 and July 17, 1954, "as herein construed and interpreted" were libelous *per se* (201 F. Supp. at p. 54).

The memorandum filed by District Judge Leslie R. Darr affirmed Judge Miller on the following ground:

> "Under the facts and applicable law we conclude that a fair and just decision was made by the District Judge in his clearly expressed opinion reported at 201 F. Supp. 47 (1962)".
>
> (Appendix.)

Both Courts concluded from the evidence that Petitioner's publications were *without malice*, and that Venn actually suffered *no special damages* because of the publications. The District Judge found *as a fact* (and this finding was approved by the Court of Appeals):

> "Considering the entire record, the Court is of the opinion first, that plaintiff has failed to prove special damages; second, that there being no actual malice in connection with the publications, the plaintiff is not entitled to punitive damages; and third, that the plaintiff can be adequately compensated by an award of general damages. Such award of general damages in the light of all relevant factors and the entire record should be in the amount of $10,000.00."
>
> (201 F. Supp. at page 62.)

Both Courts further found as a fact:

> "The evidence showed that Venn not only conducted a talkathon himself but that he also helped to a certain extent in raising money for the Sutton campaign, and otherwise helped and advised Sutton. It is no exaggeration to say that he was one of Sutton's principal advisers, certainly in the publicity aspects of the campaign."
>
> (201 F. Supp. at page 62.)

Under these concurrent findings, Petitioner earnestly submits that it was the duty of the Courts to dismiss the Respondent's claims for damages (assuming libel *per se*) under this Court's recent decision in *Barr* v. *Matteo et al.*, in 360 U.S. 564, 79 S. Ct. 1335, where this Court (quoting Judge Learned Hand) said:

> "Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a Jury of his good faith."
>
> * * *
>
> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."
>
> (*Barr* v. *Matteo et al.*, 360 U.S. at p. 577.)

In the above cited case Chief Justice Warren and Justice Douglas, who dissented, disagreed *only* on the question of whether the privilege was absolute or qualified—*immaterial in the present case because of the finding of no malice and no special damages.*

Also, the decision is in direct opposition to this Court's Opinion in *Washington Post Co.* v. *Chaloner*, 250 U.S. 290 (where this Court granted the Writ of Certiorari in a libel case, and reversed and set aside a judgment in an Opinion by Mr. Justice McReynolds), a Sixth Circuit case, quite similar to the present one.

Further, since the jurisdiction of the federal court in the present case depended solely on diversity of citizenship, it was the duty of the Courts to apply the law of Tennessee, which is set out in *Sweeney* v. *Newspaper Print. Corp.* (this same Petitioner), 177 Tenn. at p. 200, as follows

> "Language which, however, does not, as a necessary consequence, occasion damage to the party published, is not per se libelous, and in such cases a right of action exists only when as a necessary and proximate consequence of the publication, special damage ensued to the party published. Id. Secs. 146-148; Bank v. Bowdre, 92 Tenn. (8 Pickle) 723, 736, 23 S.W. 131.
>
> "Tested by the rules above, we do not think the language, of which complaint is made, will as a necessary consequence occasion damage to the plaintiff and therefore it is not libelous per se. Such language does not impute to him any want of integrity as an official, as a lawyer, or as an individual."
>
> (*Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. at p. 200.)

CONSTITUTIONAL QUESTIONS INVOLVED

This case involves a most serious and important question relating to the freedom of the press, as protected by the Constitution of the United States, and Petitioner's right to publish, without malice, *political news* arising out of issues involved in a contest for the Democratic nomina-

tion to the United States Senate engaged in by Senator Estes Kefauver and Congressman Sutton in Tennessee in the year 1954.

Petitioner recognizes, and readily admits, that it is discretionary with the Court to grant or deny this Petition for the Writ of Certiorari but urges upon the Court the importance of reviewing the decision in the present case for the reasons stated above and as set out by this Court in the following decisions:

Rice v. *Sioux City Cemetery*, 349 U.S. 70, 75 S. Ct. 614;

In re Murchison et al., 349 U.S. 133, 75 S. Ct. 623;

Aubry Williams v. *Georgia*, 349 U.S. 375, 75 S. Ct. 814.

Petitioner urges, and relies upon the following principle as set out by *Williams* v. *Georgia*, *supra*, at page 389:

> "While we must have proper regard to this ruling of the state court in relation to its appellate procedure, we cannot ignore the exceptional features of the present case. An important question under the Federal Constitution was involved, and, from that standpoint, the case did not stand alone * * *"

STATEMENT

This action for libel was brought by Venn, a resident of Miami, Florida, against Petitioner, the complaint containing eight counts, each count being based upon one article in a *series* of publications in Petitioner's newspaper growing out of a political campaign in which Senator Estes Kefauver was being opposed for the democratic nomination for United States Senator from Tennessee by Congressman Pat Sutton. Venn, who was employed by Sutton in connection with the campaign, made a series of personal

television appearances during a paid political program, advocating the election of Sutton. A controversy arose relating to the Senate Crime Investigation conducted by the United States Senate Crime Committee, of which Kefauver had been a member.

The case was tried on oral testimony before the District Judge without a jury. The District Judge held that six of the publications were not actionable, denied recovery with respect to these six publications but further held that two of the publications (July 15 and July 17, 1954) were actionable because they were libelous *per se*.

Publication of July 15, 1954

This publication was complained of in the Second Count of the Complaint, which was as follows:

"COUNT TWO.

"12. Plaintiff alleges that the defendant in the Nashville Tennessean under date of July 15, 1954, in its edition circulated among and read by thousands of people in Tennessee, and throughout the nation, published the following of and concerning him, on page 3, contained in an article made Exhibit II hereto:

"'KEFAUVER LASHES SUTTON'S BACKERS. SAYS OPPONENT GETS SUPPORT OF CRIMINALS, OIL RICH TEXANS.' (headline)

"'By Wallace Westfeldt, Staff Correspondent. Kingston, Tenn.—Sen. Estes Kefauver declared at a rally of Roane County Democrats here last night that his opponent is receiving the support of *nationwide criminal elements* and oil-rich Texans.'

* * *

"'In an hour-long speech, the senator tied in Sutton with nationwide criminal elements this way:

"'"You know we all like to be friendly with everybody. But sometimes we are known by the enemies we make. Likewise we are known by the company we keep."

"'Then Kefauver proceeded to describe the company that is now being kept by Sutton.

"'Refetring to activities of the senate crime investigating committee, which he headed several years ago, in breaking up the interstate gambling wire services, headed by Mickey McBride, Kefauver said:

"'"Bob Venn, who was in business with Mickey McBride—the man who headed the largest of these services—and who moved in circles with Al Polizzi, the Cleveland mobster, is in Tennessee right now conducting talkathons in an effort to defeat me."'

"13. Said words impute and charge that plaintiff was a part of and a tie-in with nationwide criminal elements and a criminal himself, connected with interstate gambling moving in circles with mobsters and that his talkathon was conducted with the corrupt motive of furthering the interests of such persons. Said words and said imputation are false, untrue and were published without probable cause and with actual malice. While defendant itself is legally responsible for republication of defamatory statements the quoted reference of Kefauver to 'Al Polizzi, the Cleveland mobster' is set out by punctuation so as to be reasonably construed that it was plaintiff who 'moved in circles with' Polizzi, which defendant knew to be untrue."

Venn omitted certain portions of this publication of July 15, 1954, in his Complaint, and Petitioner insists that, considering the *entire* publication (which must be done under applicable Tennessee law) both Courts erred in drawing the conclusion that that portion of the publication sued on was libelous *per se*, without taking into

consideration the entire publication on that day, as well as other related publications in the same series of articles.

The Publication of July 17, 1954

This publication was complained of in Venn's Count Four which we here copy *in full from the complaint*:

"COUNT FOUR.

"16. Plaintiff alleges that under date of July 17, 1954, defendant, in the editions of the Nashville Tennessean published on page 5 in a prominent boxed-in article certain false words quoted from O. D. Bratton, spoken of and concerning plaintiff, and read by thousands of readers, as follows, said article being Exhibit IV hereto:

"'*His talkathon was put on by a man connected with gamblers in Florida.*'"

Here Venn selected *only one sentence*, completely out of context, from a lengthy newspaper publication and the judgment below was based on *only the one sentence which we have italicized above.*

The Undisputed Testimony

It is Petitioners' contention that little dispute, if any, exists with respect to the material and controlling facts established by the testimony, including that of the Respondent, his admissions under cross-examination, and the undisputed proof offered by the Petitioner, which was not questioned by the Respondent *as he did not offer any evidence of any character whatsoever in rebuttal.*

Without unduly extending this Petition by excessive quotations, and on the assumption that the following statements will not be disputed, among other things, Venn, by his own affirmative testimony, admissions on cross-

examination, by depositions offered by him as a part of his evidence in chief and by his failure to offer any rebuttal *has admitted*, and this Court must accept as *undisputed facts* the following:

A. Robert G. Venn, the plaintiff, was associated in business with "Mickey" McBride, the controlling stock holder of the radio station WMIE at Miami, Florida; and during the entire time of his employment Venn knew that McBride was widely and publicly known, and reputed to be, a gangster, hoodlum, and an associate of criminals such as "Big Al" Polizzi, John Angersola, "Mushy" Wexler, Frank Costello and others.

B. Venn's employment as General Manager of the radio station WMIE was pursuant to an oral agreement negotiated by Venn *directly* with "Mickey" McBride, in Washington, D. C. (See Appellant's Exhibit No. 2, photostat of letter to Robert G. Venn from Arthur McBride dated August 9, 1948). This letter, in the last paragraph, expressly provided as follows:

> "I want to make it very clear that our oral arrangement was not a contract nor binding upon either of us. I made it very clear that your services would be paid for only as long as they were needed and were entirely and *completely satisfactory to me and my associates.*" (Emphasis added)

C. Not only was "Mickey" McBride admittedly the controlling stockholder of WMIE; Venn also knew that McBride owned and operated the racing wire service known as Continental Press, which was taken over by McBride and Ragen from the Al Capone group of racketeers, and which was described in the third interim report of the Kefauver Crime Investigating Committee as follows:

"FACADE OF LEGALITY A SHAM

"The committee believes that the facade of legality which was set up by Continental's counsel with such great particularity must be rejected. It must also reject the insulation erected between McBride and the ultimate customers of Continental's service, the bookmakers, and, having rejected both of these factors, the inference becomes inescapable that Arthur B. McBride created a machine in which Edward McBride, through his agents, operates a racing wire service which is an integral part of a Nationwide system employing discrimination in service and price against various persons seeking to purchase a commodity.

"The conclusion is also inescapable that through agents and subagents McBride's organization steals news from race tracks and supplies this news through direct and indirect channels to bookmakers operating in violation of the law throughout the country."

(United States Senate Reports 141, 307, 725, 82d Congress, First Session, Third Interim Report dated May 1, 1951, p. 159)

D. Venn contracted for and established a branch broadcasting station of WMIE and employed Barry Gray to do the broadcasting at the notorious bookie joint in Miami known as the "Five O'Clock Club", and Venn frequently and constantly visited with Gray at this bookie joint, admitting some ten (10) to fifteen (15) visits.

E. Venn had other business transactions directly with "Mickey" McBride, admitting that as Manager of the radio station WMIE he had borrowed large sums of money from "Mickey" McBride with which to operate the station, that in connection with a proposed television license, after first being financed by an ex-convict from Atlanta, Georgia (E. N. Claughton), who withdrew, he solicited and endeavored to induce

"Mickey" McBride to furnish the financing withdrawn by the Georgia ex-convict, the purpose being to obtain the influence of "Mickey" McBride and his associate Sherby as an alliance between the radio and the television station.

(See: "Digest of the Evidence by FCC", Dockets 9149 and 9114, sworn testimony of Venn beginning at p. 19, including exhibit No. 9, pp. 58-59, where Venn speaks in enthusiastic terms of the future of television and points out the desirability of having radio station WMIE and television under the same roof, jointly controlled by Wolfson, "Mickey" McBride and Sherby.)

F. Venn admitted in his testimony that his business association and relationship with "Mickey" McBride forced him to engage in social activities with "Mickey" McBride, as illustrated by the photographs of plaintiff Venn and his former wife attending the wedding of "Mickey" McBride's son, and freely mingling, with a smiling countenance, with such underworld characters and gangsters as "Mickey" McBride, "Big Al" Polizzi, "Big Al's" sons and other similar characters. The court will note from the expressions on Venn's face in these photographs that his attitude in associations with "Mickey" McBride and "Big Al" Polizzi was that of a congenial and socially acceptable comrade.

G. Under Venn's management and policy determinations, radio station WMIE refused and declined to carry a program sponsored by the Greater Miami Crime Commission—the program that was used by all other local radio stations with the single exception of WMIE.

H. Under Venn's management, station WMIE declined to grant the request of Florida Attorney General Irwin to delay the broadcasting of racing results for at least

thirty minutes so as to hinder the operation of bookie joints in determining results and placing bets on the next race.

I. The Federal Communications Commission of Washington, D. C., in its Public Documents and Decisions, found Venn guilty of misrepresentation under oath, and at the request of the Kefauver Crime Commission, suspended its previous decision approving Venn's petition to terminate the trusteeship of Sun Coast Broadcasting Company; and the FCC finally approved such termination and transfer *only* when Robert Venn and his associates sold the station to Governor Rivers of Georgia, such approval, however, containing a reservation that the FCC adhered to its former castigation of Venn's sworn misrepresentations. Venn then sued Rivers but voluntarily dismissed his suit before trial as he did in the present case in the Circuit Court of Davidson County.

J. Venn admitted *(and the District Count found)* that he participated in the Sutton-Kefauver campaign as a *political advisor* and consultant to Sutton, appeared on television with Sutton, their joint pictures being published in the newspapers, gave out individual political interviews in an effort to elect Sutton and defeat Kefauver, and was very industrious in soliciting funds for Sutton, obtaining $8,000.00 in cash from an unidentified oil source in Dallas, Texas, and $2,000.00 from one Cullen, a wealthy oil man from Houston, Texas.

EXCERPTS FROM CRIME COMMITTEE REPORTS

(Published U.S. Senate Documents)

"1. 'There is substantial and strongly convincing evidence that organized groups of criminals have been engaged in many parts of the Nation in illegal activities, utilizing the channels of interstate commerce, and often operating throughout many States.

"2. These organized groups of criminals command very large amounts of capital and are in a strongly advantageous position to compete both in criminal and noncriminal activities.

"3. These criminal organizations have succeeded in monopolizing certain of the channels of interstate communication and commerce by means of violence, bribery, corruption, and intimidation."

* * *

"B MIAMI

"8. These general patterns of organized criminal activity were specifically evidenced in the situation uncovered by the committee in Florida in Broward and Dade Counties, and the cities of Miami and Miami Beach, which are located in Dade County. Moreover, although hearings bearing on this point have not yet been held, the committee has convincing evidence in its possession that analogous situations exist in other portions of the State of Florida.

"9. Groups of known gangsters, from diverse sections of the country, many of whom have long criminal records, assemble primarily at Miami Beach. There they make their headquarters at certain hotels and establishments. Frank Erickson and the New York gang make their headquarters at the Wofford and the Boulevard Hotels; the Detroit gang at the Wofford and the Grand Hotels, and the Philadelphia gang at the Sands Hotel.

"10. These racketeers operate various gambling and bookmaking establishments openly and notoriously in clear violation of Florida law and apparently with the full knowledge of the entire community including the law-enforcement officers, who in some cases incredibly insisted to the committee that they had no knowledge of the operations."

* * *

"14. In 1949, a Chicago resident, Harry Russell, whose connections with the Chicago Capone group are clearly established, obtained a substantial interest in the S & G Syndicate under most suspicious circumstances.

"15. Russell was not in a position to contribute anything of value to the syndicate. The syndicate did not need additional capital and had been operating successfully. It did not need any additional members nor did it desire any. Some testimony was offered that Russell was attempting to compete with the syndicate and that he might obtain concessions at certain hotels. This testimony must be viewed, however, in the light of admitted facts that the syndicate did not offer partnerships to any other competitors. Significantly, shortly before Russell was accepted into the syndicate, the racing news wire service at Miami Beach, which was the nerve center of S & G's own monopoly, was terminated by the regional distributor for *Continental Press Service*, and an investigator especially appointed by the Governor, acting on tips and information furnished by Russell, proceeded to attempt to arrest various bookmakers of the S & G Syndicate on charges of gambling."

* * *

"The closed hearings established that bookmaking on a large scale was conducted in Miami and Miami Beach and in West Palm Beach, and it indicated that the bookmaking was an interstate operation. From the closed hearings the conclusion was drawn that the sheriffs of Broward, Dade, and Palm Beach Counties must have known of the open and notorious gambling and law violations but made no effective efforts to stop them."

* * *

"The public hearings developed more fully that the Miami area had become a gathering place for racketeers from all over the country; in both illegiti-

mate and legitimate enterprises; that they continued to gather and consort together and conspire to violate the laws of the State of Florida."

* * *

"Daniel P. Sullivan, operating director of the Crime Commission of Greater Miami, a private organization of public-spirited citizens testified extensively as to the particular criminals and their individual operation, and he stated that his commission had not been able to obtain cooperation from the sheriff of Dade County.

"Hon. Richard Ervin, the attorney general of the State of Florida testified that wire service was provided to 140 drops in south Florida by Western Union Telegraph Co., and that after Western Union was forced to continue this service, it was then provided by long-distance telephones. He stated that this service was provided by Continental Press Service as part of a Nation-wide wire service. Said Attorney General Ervin:

> 'A lot of people say it is not right for the Federal Government to encroach on our law enforcement, but the picture is well known about the tie-ins of this wire network and all the people who are part of it. They are encroaching on us and the morals of our community and we need the help of the Federal Government. When I ran for office, I didn't realize what the implications were. I didn't realize the moral and economic points involved in it, but there is no question in my mind, Senator Hunt, but what we are having a moral reawakening in this community and in the State. They say, too, that people are going to gamble regardless of what you are going to do. They say it is necessary for the tourist business. I think they are mistaken.'

"Syndicates Rich and Powerful

"Attorney General Ervin also testified that the bookmaking and gambling in Florida are dominated by syndicates with men in them so powerful and wealthy that they can bribe and influence public officials.

"Melvin J. Richard, a councilman of the city of Miami Beach, testified that Phil Short, a lieutenant of the Miami Beach police force, who formerly had been chief of police, admitted to him that he had orders from the city manager to refrain from raiding gambling operations. Short admitted to Richard that the operations could easily be closed down and that on two occasions they had been closed down, but he stated that he had been ordered to allow the gambling to stay open. Much of Richard's testimony was corroborated by the transcript of a telephone conversation with Short, which Richard had recorded with a wire recorder. Efforts were made to get Richard to 'go along with the syndicate' and when these failed a petition was circulated for his recall. Ben Cohen, attorney for S & G Syndicate, was one of the principal movers of this petition. *Richard was also vigorously opposed over radio station WMIE. Principal stockholder of this radio station is Arthur B. McBride, whose son, Edward J. McBride, is the sole owner of Continental Press Service.*"

* * *

"At the moment the chief known source of income of these gangsters is gambling. They appear particularly to have been active in obtaining the monopoly now enjoyed by Continental Press Service, race wire distributor, and by its regional and local distribution agencies. Although it is maintained by Continental Press Service and also by the individual racketeers that there is no connection between them, it would appear to be more than coincidence that Continental Press Service and its distributors enjoy a monopoly

which has been forcibly established by these closely knit groups of gangsters".

The Crime Committee filed and published its second interim report on February 28, 1951. Included in this report were the following findings of fact, which we have selected as typical, although the entire report is in the record:

"It cannot now be denied, as will appear more fully later in the report, that the doubt which originally existed in the minds of many intelligent and careful persons as to whether crime is organized in the United States was in great measure deliberately planted there. It was created by criminals who have vast resources and incalculable power. They have amassed and hoarded tremendous wealth out of the proceeds of their criminal activities and with it they have sought to purchase respectability so that the true nature of their operations would not become known. *They have insidiously cultivated the association of persons whose integrity and character are unquestionable.* They have sought membership in social clubs and other organizations where they might acquire the status of respectability in their respective communities. They have been lavish in their gifts to charity, and they have publicly promoted philanthropies, *all in an effort to hide their crimes behind the shielding cloak of respectability.*

"*And to carry out this fiction in many cases they have invested in legitimate business so that they could always point to these false fronts and claim that they were no longer engaged in crime in the event that a question might ever be raised as to their former criminal associations.*

"Nor was this situation confined to any one particular community or State. It was an open secret in the State of Florida, one of the Nation's best-known playgrounds, where at certain seasons of the year af-

fluent Americans from all parts of the country would gather for their vacations, presumably well provided with money and seeking excitement, that criminals from Chicago had moved in during the early part of 1949 and were attempting to take control of the largest and most lucrative bookmaking operation in the entire State.

"It was no secret in the State of Florida at the same time that a criminal gang basing its operations in New York and northern New Jersey had taken control of the largest gambling casinos in Florida and New Jersey and were mulcting millions of dollars out of these gambling games from anyone who would play."

* * *

"It was no secret in Chicago that the head of a Nation-wide wire service which furnished news of horse racing over leased wires from one corner of the country to the other was ambushed and shot after a lengthy dispute with a gang of criminals who were trying to take over control of this lucrative service."

* * *

"To arrive at a thorough, accurate, and over-all picture of the problem of organized crime in interstate commerce, the committee, consisting of Senator Estes Kefauver as chairman; two other Democratic members, Senators Herbert R. O'Conor and Lester C. Hunt; and two Republican members, Senators Charles W. Tobey and Alexander Wiley, has visited and held hearings in many parts of the country. As of the date of this report they have held executive sessions and public hearings in *Miami*, Kansas City, Washington, Chicago, Philadelphia, New York, St. Louis, Las Vegas, San Francisco, Los Angeles, Tampa, New Orleans, Cleveland, and Detroit. Approximately 500 witnesses have been heard. The minutes of these hearings constitute the basis of this report."

* * *

"Augmenting the investigative efforts of its own staff, the committee has had the valuable assistance of numerous national, State and local organizations, notably the crime commissions of several States and cities.

"Of particular help have been the activities of the commission on organized crime of the American Bar Association, headed by former Secretary of War Robert P. Patterson. Indeed, to Hon. Morris Ploscowe, of New York City the executive director of that commission, the committee is especially indebted for assistance in the preparation of this report."

Section II of this report deals with the general subject of "How Criminal Gangs Operate" and among other things states:

"(5) They employ the gains and profits from these illegal activities to infiltrate into legitimate enterprises, to which they bring the operational methods of their criminal business, i. e. monopoly, enforced by intimidation and strong-armed violence."

Section IV of this report deals with "Interstate Relationship of Leading Gangs" and contains the following statement:

"The grand jury of Dade County, Fla., complained that—

'our community is fast becoming the national capital wherein the so-called leaders of the criminal element of numerous communities throughout the land are congregating.'"

Under Section V, the report deals with "Racing Wire Service Controls Bookmaking", and with special reference to Miami, states:

"In Miami, Harry Russell, a representative of the Chicago mob, muscled his way into a one-sixth part-

nership in the S. & G. Syndicate, a $26,000,000-a-year bookmaking operation, for a nominal consideration of $20,000, which was probably never actually paid in the real sense of the word. Accardo's and Guzik's partnership income tax returns showed that they, and not Russell, took the deduction for 1949 for losses sustained in the S. & G. operation.

"The principal evidence of nation-wide operation by members of the Chicago crime syndicate is tied up with the apparent control by the Capone mob of the wire services to bookmakers. As we shall see presently, the control of the wire services provides a stranglehold over large bookmaking operations. To the extent that the Capone crime syndicate controls the wire service, it is in that proportionate measure a partner of every bookmaker of any consequence in the country. These matters will be developed subsequently in greater detail since the committee's inquiry into all these matters is still proceeding."

Under Section VII, the Committee reported that "Bookmaking is an Organized Industry", and under Section VIII, the Committee reported in this public document that "Wire Service" was essential to the monopoly, the report stating specifically:

"Big-time bookmaking operations largely monopolized by the big mobsters with their rich returns cannot be carried on without the rapid transmission of racing information and information about other sporting events."

Section IX deals expressly with "Mickey" McBride's monopoly, known as "Continental Press Service", stating:

"The wire service today, insofar as purveying information to bookmakers is concerned is a monopoly throughout the country.

"On the surface, the Continental Press Service, the central distributor of racing news, is a sports news

distributing company which is wholly owned by Edward McBride, Jr., a young law student at Mami University, who takes no part at all in its management. It is run by Tom Kelly, McBride's uncle, who is the general manager. Technically the Continental Press Service has nothing to do with bookmakers. It does not sell directly to them. It sells news to from 20 to 24 supposedly independent regional distributors who in turn deal either with subdistributors or with bookmakers. One finds, however, the most extraordinary business arrangements between the Continental Press Service and its distributors, which indicate quite clearly that the latter are nearly all dummies, set up to insulate the Continental Press Service against the charge that it deals directly with persons engaged in illegal occupations. For example, the Illinois Sports News is one of the top distributors of Continental Press Service. Its ownership consists of Tom Kelly's brother and his son. It has no written contract with Continental Press Service, but news is provided to the Illinois Sports News on an oral agreement to pay as much of the profits as possible. 'I told my brother,' testified Tom Kelly before this committee, 'to pay Continental Press as much as he possibly could and don't short them. I told him to send Continental whatever he could afford and to make sure it was a good substantial amount of what his profits was.' This varied from $2,000 to $10,000 a week."

The following quotations from this absolutely privileged report graphically describe how "Mickey" McBride musceled in and took over these illegal activities:

"Arthur M'Bride Takes Over"

"McBride, in his testimony before the committee, said he believed that without him the organization would have fallen apart. But his testimony is also on record to the effect that when he went into the wire service he knew nothing about it, had no time to devote to it and that if, at Kelly's asserted plea, he did go

into the business, it would have to be run by Kelly and Ragen.

"From McBride's testimony, the committee finds it hard to discern just how his person was indispensable to the conduct of the racing wire service. McBride said that it was necessary for him to provide the original working capital of $20,000 but this does not appear to be convincing because $20,000 in the operation of the new racing wire service which was given the appellation Continental Press Service appears to have been small money. As a matter of fact, McBride got his $20,000 back out of net profits before 2 weeks had elapsed. It was also apparent that Ragen could have put that amount up out of his own pocket or could have borrowed it without any difficulty whatsoever.

"McBride testified that the only reason he went into the business was to help his brother-in-law, Kelly, and another old friend, Ragen. It was suggested by counsel for the committee that he could have loaned Kelly $20,000 and allowed Kelly to become the owner of the business but McBride said that he did not feel Kelly was sufficiently seasoned in business to be trusted with a loan of that size—this despite the fact that McBride had loaned similar amounts to known gangsters on at least two occasions and also despite the fact that when he did take the business over he had to trust Kelly to run it.

"McBride stayed in Continental until 1941. Then he sold out to Ragen.

"The story continues with Ragen and Kelly operating Nationwide until 1943 when McBride says Ragen came to him and said that he simply had to have McBride or a member of McBride's family in the organization. Nobody has given a clear reason for this because McBride, in his testimony before the committee said that he had not learned anything further about the business up to that time and he had neither the energy nor available time to give to it.

"McBride had a son, Edward, who at that time was overseas with the Armed Forces. Obviously Edward could not give any attention to the business. But for him McBride purchased a one-third interest for $50,000. Why McBride had to be bought into a business which was operating successfully and did not need capital is obscure unless it was to make available to the business such advantages as might result from McBride's powerful connections with John Angersola (King) and the important leaders of the Mafia in Cleveland.

"Continental Press Service continued to operate without serious trouble until about 1946. *During this period Ragen and McBride operated it as partners and there is no indication on the record that during this period it was dominated by any out-and-out gangster element although, beyond any doubt, Continental Press enjoyed amicable relations with the gangsters who were building up large-scale bookmaking operations in the bigger cities of the country.*"

* * *

"One of the most significant aspects of the racing wire story in Florida was the manner in which service from Chicago was cut off from the S. & G. Bookmaking syndicate and its operatives in order to force that syndicate to take into partnership the Capone gang whose front man was Harry Russell, a Chicago gambler and former partner of Tony Accardo. A representative of the Western Union Telegraph Co., over whose wires the racing news to Miami Beach was carried, testified that the cut-off was ordered by William (Butsy) O'Brien.

"Continental Press claimed that if all these things occurred they were done by independent news-distributing companies to whom Continental sells the news, but over whom it has no control. Continental, it is claimed stands simon-pure as a central news-distributing agency, which does not steal news or deal with bookmakers or characters of the underworld.

"The facade of legality which Continental Press has erected for itself on the advice of eminent and learned counsel is a sham. In a court of law, as a corporate structure, it might stand up. But this is all the more reason why the true facts must be called to the attention of the Senate.

"Continental Press is said to be owned by Edward McBride, a young man in his early twenties studying law in Miami, Fla. He knows nothing of its operations. Continental Press is operated by young McBride's uncle, Tom Kelly, who says he simply sells a news service to Illinois Sports News, Inc., and he does not know, he says, what Illinois Sports News does with it thereafter. It is significant that Illinois Sports News hired Pa Burns and the other dissident Continental employees back after Trans-American went out of business. It was Illinois Sports News that resumed business with R & H after Ragen was shot. Strangely enough, Illinois Sports News is operated by two other Kellys, the brother and son of Tom Kelly of Continental.

"On the business side, Illinois Sports News does not keep the considerable profits that it earns but it remits to Continental all of its net profit beyond a certain amount which has been agreed upon as a fair payment to Kelly's relatives for their services for running the outfit."

* * *

"Facade of Legality a Sham"

"The committee believes that the facade of legality which was set up by Continental's counsel with such great particularity must be rejected. It must also reject the insulation erected between McBride and the ultimate customers of Continental's service, the bookmakers, and, having rejected both of these factors, the inference becomes inescapable that Arthur V. McBride created a machine in which Edward McBride, through his agents, operates a racing wire service

which is an integral part of a Nation-wide system employing discrimination in service and price against various persons seeking to purchase a commodity.

"The conclusion is also inescapable that through agents and subagents McBride's organization steals news from race tracks and supplies this news through direct and indirect channels to bookmakers operating in violation of the law throughout the country. Whether this constitutes violation of local laws on the part of McBride is a matter for the determination of the courts in the respective States. The sole function of this committee in respect to the circumstances is to ascertain the facts and to determine whether or not any Federal legislation or regulation is required.

"It also becomes inescapable, once the fiction of the divorce of Continental Press and McBride from the various distributors of Continental's news service, particularly in Chicago, has been rubbed out that Arthur McBride is deliberately making a gift to the Mafia-affiliated Capone mob in Chicago of about $4,000 a week, which represents the difference in price paid by the Capone-controlled R & H service and the price paid by their competitors in the same city. In Kansas City, the Mafia group operating the wire service receives largesse of several hundred dollars a week on the same comparative basis. It is also clear that in many other cities the Capone affiliates and the Mafia are now in control of the distribution of racing wire news with a resultant source of enormous profits and power over bookmaking.

"The committee has given careful thought to a proposal which might remedy this situation. It is essential that legislation or regulation be devised which will cure the evils that have been set forth so extensively above and at the same time will not impinge upon any constitutional rights guaranteed to those whose legality of operation is not a sham. These considerations are highly involved and for the purpose of this interim report the committee merely wishes

now to state that a thorough study of the situation with respect to corrective legislation is proceeding and recommendations will be forthcoming in the committee's final report."

* * *

"A gangster in a legitimate business does not suddenly become respectable. The methods which he uses to achieve success in racketeering and gambling enterprises are not sloughed off. Thus there is evidence in the testimony concerning the use of homicide, intimidation and strong-arm violence to eliminate competition or to compel customers to take merchandise sold by the mobsters. Monopoly and unfair competitive methods are the keys to the big money in criminal activities. It is also sought by the mobsters when they enter legitimate business. In addition to attempting to secure monopolies, there is considerable evidence of their black-market practices, tax evasion and unjust enrichment from legitimate businesses. These practices add further to the tremendous economic and political power which is wielded by the forces of organized crime."

Third Interim Report of the Crime Investigation Committee, United States Senate, May 1, 1951.

This interim report, all of which was offered in evidence by the appellant, repeats many of the conclusions contained in the previous interim reports, and although there may be some overlapping or duplication, it is believed important, and certainly convenient for the Court, to quote the following sections from this report:

"7. Rapid transmission of racing information and gambling information about other sporting events is indispensable to big-time bookmaking operations. This information is presently being provided by a monopoly operated by the *Continental Press Service*. The Continental Press Service, at critical times and in crucial

places where monopoly of bookmaking is at stake, yields to the domination and control of the Accardo-Guzik-Fischetti crime syndicate, to which it is beholden for its own monopoly in the wire-service field. The wire service is so vital to large bookmakers that they are compelled to pay what the traffic will bear to the Continental Press Service. This makes it possible for the Accardo-Guzik-Fischetti crime syndicate to participate in the profits of bookmaking operations throughout the country."

(p. 3 of report)

* * *

"An expression of appreciation should be recorded for the cooperation and assistance of the Commission on Organized Crime of the American Bar Association, of which former Secretary of War Robert P. Patterson is chairman.

"All members of the Commission activity participated in the program. Through them, the American Bar has rendered a tremendous service to the committee. The Commission members included: Walter P. Armstrong, Jr., Memphis, Tenn.; Howard L. Barkdull, Cleveland, Ohio; Arthur J. Freund, St. Louis, Mo.; Phillip S. Habermann, Madison, Wis.; Laura Lee M. Hyde, Jefferson City, Mo.; and Chief Judge Bolitha J. Laws, Washington, D. C."

* * *

"State and local officials, from governors of States and mayors of cities, down to policemen on their beats went out of their ordinary paths to be of assistance to the committee. Crime commissions composed of citizens, like those in Greater Miami, Chicago, St. Louis, and the State of California, provided dossiers on local crime conditions which advanced the starting point of committee investigators. Special thanks are expressed to Daniel Sullivan of the Greater Miami Crime Commission and Virgil Peterson of the Chicago Crime Commission and their officers and staffs. The work of these two crime committees through their

courageous officers and most able directors is outstanding and serves as a splendid example for other voluntary crime commissions."

(p. 23 of report)

* * *

"The committee subscribes most heartily to the statement of J. Edgar Hoover, Director of the Federal Bureau of Investigation, that if there were in every town in the United States a crusading newspaper which, without fear or favor, would turn the spotlight of pitiless publicity on corruption, gambling, and vice in its area, major progress would have been made toward cleaning up that particular community."

(p. 24 of report)

* * *

"At about the same time, the Continental Press Service, which is controlled by the Capone gang, cut S. and G. off from the wire service, without which no large-scale bookmaking enterprise can dare to do business. When S. and G. attempted to get the news service from other bookmakers in Florida, service was cut off throughout the State."

(p. 33 of report)

* * *

"*Daniel P. Sullivan*, director of the Greater Miami Crime Commission, set before the committee a detailed statement as to the gambling and bookmaking operations, the criminal records and backgrounds the infiltration of these criminals into legitimate businesses in Florida, and their out-of-State connections. The crime commission and the Law Enforcement League of Dade County, had both called the attention of the sheriff of the county to the open and notorious gambling operations. These activities went on, not only with public knowledge, but with a considerable amount of public acquiescence. In the words of the director of the crime commission:

'There is quite a large group of people that think that gambling is an asset in that it is an inducement to the tourists. They feel that it is just a question of placing a dollar bet, and the average person does not realize the ramifications of what happens when it becomes highly organized and operated by syndicates.'

"Attorney General Ervin also called attention to the segment of public opinion which believes it is impossible to stop gambling, and that in any event it is good for business. Certain public officials with a demonstrated antipathy to law enforcement supported this viewpoint; the sheriff of Broward County flatly stated that he had been elected because he was known to have a liberal point of view, that he favored a wide-open town; the sheriff of Dade County observed that $20,000,000 legal gambling at the tracks creates an atmosphere so favorable to gambling that the illegal off-track gambling is hard to stop."

(p. 34 of report)

* * *

"In the opinion of many witnesses, criminals from all over the Nation were able to act freely in the Miami area because the concentration of economic power they brought in from outside, enabled them to control local government and corrupt substantial portions of the community. 'The profit motive in this thing is tremendous,' said Attorney General Ervin, 'and they naturally have to protect their investment; and if they can bribe or buy anybody, they naturally will do it.' Bookmaking and gambling, he stated, were dominated by syndicates including men so big that they can bribe and influence public officials."

(p. 35 of report)

Near the conclusion of this report, the committee, after reviewing the sworn testimony in detail, published the following conclusions with respect to "Bookmaking and the Race Wire":

"As the committee pointed out in its second interim report, the form of gambling which depends most on interstate commerce and interstate communications is off-track betting on horse racing and dog racing. The *backbone* of illegal bookmaking operations throughout the country is the up-to-the-minute information furnished by the *Continental Press Service* through its Nation-wide network of telephone and telegraph wires, and the intricate organization of distributors and subdistributors that gather and disseminate the news for Continental

"The heart of the racing news service centers in Chicago, where Continental has its main operating office, and from which most of its wires fan out to the rest of the country. While in Chicago, this committee focused its attention to a considerable degree on the operations of the Continental Press, its relations with the distributors through service by the same racketeering elements who control the large-scale and lucrative handbook operations

"The headquarters of the race wire service have been established in Chicago since before John Torrio became the underworld king of the city in 1920. Interestingly enough, the building which was occupied by Monte Tennes and his General News Bureau racing service now houses the offices of the Continental Press Service, some 30 years later. But the story of the race wire service, while inextricably linked with Chicago's past and present, is not only a story of Chicago but of every city and town in the country into which the tentacles of the wire service reach. For this reason, the committee discusses the history and operations of the wire service in a separate section of this report.

"The committee has described the workings of the Continental Press Service and exposed its *facade of respectability* and attempted insulation from the handbook operators who depend on it for information and on whom it depends for revenue. Just as the race

wire service is essential to the success of large-scale betting operations, the substantial income which channels into Chicago from the wire service depends on the continuous operation of a flourishing handbook business. United Press and Associated Press pay a nominal fee of from $70 to $80 a month for the information that Continental distributes; the Illinois News Service, a single distributor, pays about $250,000 annually for the same service. The difference in these rates is the profit of the handbook operators which is passed on, in part, to the subdistributor and distributor for Continental, and ultimately to Continental."
(p. 53 of report)

In view of the fact that Venn testified under cross-examination that while acting as Sutton's advisor he received instructions to go to Dallas, Texas, and there, through some pre-arranged signals, he was met by a man whom he did not know, was taken to an office whose location he could not describe, and into a private office on a floor he did not remember, on the door of which office names were painted which Venn could not recall where he was handed an envelope containing $10,000 *in currency* for which he was requested not to give or take a receipt, and thereupon Venn returned to Tennessee, extracting $8,000 out of the currency to be applied on the compensation due to the partnership of which he was a member, and delivered $2,000 to Sutton for his campaign expenses.—we deem it proper to quote from this Senate report the following conclusions of the committee with respect to Dallas, Texas:

"Gangster's Own Description of Operations"

"The records of Paul Jones' and Pat Manno's negotiations with the *Dallas officials* amply corroborates the existence and method of operation of organized criminals. Typical are the following recorded state-

ments of Manno, whom his associate called the No. 5 man in the Chicago syndicate:

> 'Sure. Once you get organized, you don't have to worry about money. Everything will roll in in a nice quiet manner, in a business like way. You don't, he don't have to worry about it personally. Everybody will be happy I'm sure. * * *'"
>
> (p. 57 of report)

"The other situation relates to the wire service. Arthur B. McBride, whose son is the nominal owner of Continental Press, described in some detail at the Cleveland hearing his key position in the distribution of gambling information to bookmakers for over a score of years through the wire service. His testimony will be considered in the section of this report dealing with the wire service. It should be noted, here, however, that one of McBride's 'tough boys' upon whom he depended during the days when he was involved in newspaper circulation and taxicab wars, was Morris 'Mushy' Wexler. Mushy, like so many of McBride's former musclemen, now holds a key position in the distribution of wire service for Continental Press in the Ohio area through his ownership of the Empire News Service. Wexler could not be questioned as he evaded the service of a subpena, but in Ohio as elsewhere, although there is an attempted facade of respectability, the Empire News Service is primarily engaged in the distribution of gambling information to bookmakers."

(pp. 70-71 of report)

* * *

"III. *The wire services*

"With an important race track in the area, with handbooks running openly throughout the parishes, and with horse rooms figuring substantially in the activities of the luxurious gambling casinos, New Orleans was an important focal point for the wire services of the Continental Press Service. One of its lines

ended in a building just outside the Fair Grounds race track and operated only during the racing season. Obviously this was Continental's means of getting information from the track for dissemination throughout the Nation. Other Continental lines went to the Gretna and New Orleans offices of the Daily Sports News which published racing results and forms.

"During the struggle of the Capone group in Chicago to take over Continental, the New Orleans wire installation became the object of a typical, successful, and mysterious attempt at muscling in. The attempt involved setting up a branch of Trans-American the Capone news service, as a rival to the local branch of Continental by men with criminal records and connections with the Capone gang. Typically, the rival service lured employees from the local service and created an eventual merger of the two with the Chicago group or its local representatives holding the lions share of the participation. Everybody involved in the struggle—the owners of the services and their employees, or law-enforcement agents with an ultimate knowledge of the wire services in other respects—refused to testify at all or gave meager information with extreme reluctance. The picture had to be pieced together from meager admissions, court documents, Western Union records, and committee investigative reports.

"John J. Fogarty, owner with his son of the Daily Sports News, had been publishing racing results and forms in New Orleans for nearly 30 years. *He received his information over a direct wire from Continental Press from Chicago.* He insisted he was an independent owner not an agent of Continental. But he had a characteristic agreement, made personally and orally in Chicago, with the manager, Tom Kelly, *requiring him to pay $4,000 a week when he could, as much as possible in weeks when that sum was too large.*"

(p. 80 of report)

"Continental Press Service a Monopoly"

"As stated in that report, the committee is of the opinion that the Continental Press, which has a monopoly of the transmission of gambling news throughout the country, is not fully controlled by *Edward McBride*, its nominal owner, or by Thomas Kelly, its general manager, but is substantially influenced by the gangsters who constitute the Capone crime syndicate. As a corollary, the Capone syndicate has the power to dominate bookmaking operations of any size throughout the country."

REASONS FOR GRANTING WRIT.

It is believed that the Writ of Certiorari should be granted by this Court under its Rule 19, the Court of Appeals having decided an important state question in a way in conflict with applicable state law, and also because the Court of Appeals has rendered a decision in conflict with an applicable decision of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, particularly for the purpose of continuing the existing guarantee of freedom of the press in public political controversies.

In addition to the authorities heretofore cited and quoted from we call the Court's attention to *Langford* v. *Vanderbilt University*, recently decided by the Tennessee Court of Appeals, certiorari denied 318 S.W.2d 568; *Hayslip* v. *Wellford*, 195 Tenn. 621, 263 S.W.2d 136, 42 A.L.R. 2d 820; *American Publishing Co.* v. *Gamble*, 115 Tenn. 663, 678, 90 S.W. 1005, and particularly the following recent decisions of various federal Courts, *all directly in point*, and all *contrary* to the decision sought to be reviewed.

Wallingford v. *Zenith Radio Corp.*, (7th Cir.) 316 F.2d 693.

Hogan v. *New York Times Co.*, (2nd Cir.) 313 F.2d 354.

Brownfield v. *London*, (D.C.) 307 F.2d 389 (Cer denied).

CONCLUSION.

For the foregoing reasons Petitioner urges that the Petition for the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE SIXTH CIRCUIT

ROBERT G. VENN,
Plaintiff-Appellee,
v.
TENNESSEAN NEWSPAPERS, INC.,
Defendant-Appellant.

ORDER

Before: Weick and O'Sullivan, Circuit Judges; and Darr, District Judge.

In this libel action against defendant-appellant, who conducted a daily newspaper in Nashville, Tennessee, the District Judge found two of the alleged libelous publications to be libelous per se and awarded damages to the plaintiff-appellee.

The oral arguments made and the briefs submitted by the attorneys for the parties have been carefully considered and the facts revealed by the appendices have been fully reviewed. Under the facts and applicable law we conclude that a fair and just decision was made by the District Judge in his clearly expressed opinion reported at 201 F. Supp. 47 (1962). Therefore in accord therewith,

IT IS ORDERED that the judgment be affirmed.

Approved for entry:

s/ Leslie R. Darr,
United States District Judge
Sitting by Designation.

Office-Supreme Court, U.S.
FILED
MAY 27 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1075

OCTOBER TERM, 1962.

TENNESSEAN NEWSPAPERS, INC.,
Petitioner,

vs.

ROBERT G. VENN,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. .....

OCTOBER TERM, 1962.

TENNESSEAN NEWSPAPERS, INC.,
Petitioner,

vs.

ROBERT G. VENN,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

No Question Presented Justifying Writ

Pursuant to Rule 16(2) (a) of the Sixth Circuit Court of Appeals, Petitioner stated three questions involved in its brief in that Court, one of which is totally abandoned, the other two being, as stated by Petitioner in its brief in the Court of Appeals:

> "1. Are the publications complained of in Count Two (July 15, 1954) and Count Four (July 17, 1954) of the Complaint libelous *per se*?
>
> The District Judge answered this question 'Yes'.
>
> Appellant contends that this question should be answered 'No'.

2. Are the publications complained of in Count Two and Count Four privileged (either absolute or qualified)?

The District Judge answered this question 'No'.

Appellant contends this question should be answered 'Yes'."

No Constitutional Issue Involved

The petition presents no constitutional question to this Court. Supreme Court Rule 23(d). The statement of issues in the Court of Appeals, *supra*, presented no constitutional question. The answer of petitioner in the District Court pleaded no constitutional question (Appellant's Appendix 16a-29a, in Court of Appeals), nor did the agreed pre-trial order (Appellant's Appendix 31a, in Court of Appeals). Nowhere in any Court has Petitioner pleaded any provision of any constitution.

No Issue of Privilege Available As to Counts Two and Four Here Involved, Because Not Pleaded

There was no plea of privilege as to Count Four (Appellant's Appendix 23a-24a, in Court of Appeals).

As to Count Two petitioner stated in its answer:

> "Defendant denies that said article imputed that plaintiff was conducting his 'Talkathon' in the interest of Al Polizzi, 'the Cleveland mobster', such description being an *exact quotation* from the privileged Kefauver Crime Commission report hereinbefore referred to *insofar as its characterization of Al Polizzi* was concerned." (Appellant's Appendix 22a-23a, in Court of Appeals—Emphasis supplied).

Petitioner has never pointed out any such quotation from the Crime Commission Report.

Such plea might be good in a suit by Polizzi but is not a plea of privilege to a suit by Venn, who was not linked

with Polizzi in any Crime Commission reports, nor with McBride in any improper activities.

No Issue As to Actionability Per Se—Foreclosure by Concurrent Finding

The publications in both Counts Two and Four were libelous *per se*, as a matter of law as set out in the opinion of the District Judge (particularly see 201 F. Supp., pages 54-55, pages 10 and 11 hereof).

Even if not libelous *per se* as a matter of law, the publications were ambiguous, and the question would have been a question of fact. *Washington Post Co.* v. *Chaloner*, 250 U.S. 290 (1919); *Peck* v. *Tribune Company*, 214 U.S. 185 (1909).

The Supreme Court will not disturb concurrent findings of the District Court and the Court of Appeals, if there is evidence to support them, at least in the absence of clear error.

> *Anderson* v. *Abbott*, 321 U.S. 349 (1944), r'hg denied 321 U.S. 804; *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Company*, 321 U.S. 275 (1944); *Williams Manufacturing Company* v. *United Shoe Machinery Corporation*, 316 U.S. 394 (1942).

There was ample evidence to support the concurrent finding that the articles were libelous *per se* (Appellee's Appendix 81b, 85b, in Court of Appeals). Respondent's nationwide Talkathon business (outside his home state) was naturally and foreeseeably destroyed (Appellee's Appendix in Court of Appeals 31b-34b, 41b-42b).

There was no evidence to the contrary.

Not only is there no pleading of privilege as to Counts Two and Four, there is no evidence to support any claim of privilege as to these two counts. The concurrent find-

ings of the lower Courts are supported by all the evidence in all respects.

Some of the Findings of the Trial Judge

The Respondent, Robert G. Venn, received at the hands of the District Judge, a $10,000.00 judgment. The District Judge answers so very well so many of the statements made in the Petition, both as to the background and character of Mr. Venn and what this lawsuit is about, that we quote portions from his opinion. In 201 F. Supp. 47, at page 51, Judge Miller held:

> "At the time of the publication of the articles upon which the suit is predicated, and for a number of years prior thereto, plaintiff Robert G. Venn was engaged in advertising and publicity promotion, principally in radio and television fields. He had occupied positions of responsibility and authority in both radio and television and had acquired a reputation for competency, experience, responsibility, and integrity in radio and television advertising and promotion, and also in the field of management. The defendant is, and was at all times material herein, owner and publisher of the 'Nashville Tennessean', a metropolitan daily newspaper with extensive circulation in other states and in foreign countries.
>
> "Among his other activities, plaintiff had originated, developed and produced a type of television program which had become known to the public as the 'Talkathon', a program on which a political candidate would appear for prolonged periods of time without interruption to receive and answer questions submitted by the public viewers. In the summer of 1954, the defendant, through the Nashville Tennessean, vigorously supported Senator Estes Kefauver in a contest with Congressman Pat Sutton for the Democratic nomination for United States Senator from Tennessee. During the campaign the plaintiff Venn was engaged to

conduct several television 'talkathons' for Congressman Sutton."

In finding false the two publications (Counts Two and Four, pages 6-8 of Petition) Judge Miller stated at pages 55-56:

> "The general rule is that publications that are libelous *per se* are presumed to be false, 33 Am. Jur., Libel and Slander, Sec. 274, a rule which obtains in Tennessee. *Hipson* v. *Pollock*, *supra*, 159 Tenn. at p. 3. But in addition to this legal presumption the entire record in this case affirmatively establishes the falsity and inaccuracy of the statements contained in the articles of July 15 and July 17 with respect to the plaintiff Venn. The clear inference in the July 15 publication that the plaintiff Venn was associated in business with Mickey McBride in carrying on and conducting an interstate gambling wire service which was broken up by the Kefauver committee is conceded to be erroneous. While it is true that the plaintiff was general manager of radio station WMIE in Miami which was owned in part by Mickey McBride, the plaintiff was never connected with McBride in connection with the Continental Press Service which was at one time owned and controlled by McBride, or any other gambling wire service. Also completely false is the statement in the July 15th article that the plaintiff moved in circles with Al Polizzi, 'the Cleveland mobster'. There is evidence in the record that an Al Polizzi was present at the wedding of McBride's son, which was also attended by the plaintiff. But the overwhelming evidence establishes the fact that the plaintiff did not move in circles with Al Polizzi or with mobsters, gangsters or members of the underworld. Also false is the statement in the July 17th article to the effect that the plaintiff was connected with gamblers in Florida. The truth is as shown by the clear preponderance of the evidence that the plaintiff had no connection with gambling interests in that state or elsewhere.

"The plaintiff had enjoyed a successful career in radio and television, having been assistant promotion manager of the National Broadcasting Company at Chicago, sales manager of WRJN at Racine, Wisconsin, and promotion manager of WSGN at Birmingham, Alabama. He was later employed by Storer Broadcasting, operator of a chain of radio and television stations, as promotion and merchandise manager of radio station WAGA at Atlanta, Georgia. Because of his outstanding work at WAGA, he was transferred to Miami on October 1, 1943, to manage the Storer company's radio station WGBS. During his tenure as managing director of WGBS, he formed the Southern Radio and Television Equipment Company, parent organization of Miami's first television station, WTVJ. In 1948, he left the Storer organization to join Lincoln Opening (sic) Company, and he later became general manager of radio station WMIE at Miami. In the early 1950's, he left the employ of WMIE to enter private business. From 1952 to 1954, his efforts were devoted principally to the production of television talkathons, a venture which proved to be profitable. *His excellent reputation for ability, industry and integrity in his profession is shown by the testimony of numerous character witnesses. The record further discloses that in his participation in various publicity and political campaigns, his services were utilized by those persons and organizations opposing gamblers and criminal elements and by political candidates running on platforms calling for rigid law enforcement.*" (Emphasis supplied).

Notwithstanding the fact that Judge Miller found that six of the publications were not libelous *per se*, he did find that a central and untrue theme trying to link Sutton with the underworld via Venn ran through all the articles. He stated:

"It would unduly prolong this opinion to recite the many statements of the various articles, most of which

are *excessively prolix, rambling and discursive, but there can be no doubt that the one point that the articles sought to establish and to impress upon the public was that Sutton was being supported in his efforts to unseat Kefauver by the gangster elements of the country and that his campaign was being fed large amounts of money from the underworld for this purpose.* (Emphasis supplied). With this central theme the articles make repeated references to the investigations of the underworld made by the Senate Crime Committee and headed by Senator Kefauver, to the fact that Kefauver investigated, among others, the Continental Press Service, a national racing wire service, at one time headed by Arthur B. (Mickey) McBride, to the fact that the Continental Press Service was put out of business as a result of such investigations, to McBride's background and activities, to the FCC hearings concerning radio station permits in which McBride was interested and to many other subsidiary facts." (at page 51).

No Witness Introduced by Petitioner

It is to be noted that the Petitioner put on *no witnesses in its defense*, apparently relying only on references to the FCC and Senate Crime Committee reports by way of some sort of justification for its publications. As above noted by the Trial Judge, the series of articles made repeated reference to the said reports and this *identical procedure* is followed by Petitioner from page 10 to page 34 of its 35 page Petition. Actually, the Senate Crime Committee's reports and the records of the FCC were hearsay evidence and were excluded as substantive evidence. The Trial Judge correctly ruled them inadmissible as substantive evidence, for instance, as to the truth of the matters testified to by the witnesses in said hearings or the truth of conclusions therein reached. An order was entered rejecting said exhibits as substantive evidence. (Ap-

pellee's Appendix, 9b, 10b, in Court of Appeals). *The Petitioner has never challenged the ruling of the Trial Judge.* Thus virtually the entire Petition is based on records and reports which have been excluded as substantive evidence. Petitioner's so-called "The Undisputed Testimony" (pages 8-12 of Petition) simply is not proved in the record. In fact, Petitioner never offered any evidence that it had even checked or read said records and reports prior to the preparation of any of the publications. Had it actually done so, it would have been a simple matter to put on evidence to this effect. The fact that it could have put on such evidence and did not do so raises in Tennessee "a strong presumption of law" that the testimony of such uninterrogated witness would not sustain the contention of the party failing to call him. The rule applies with peculiar force to a party to a suit who refuses to testify.

Fisher v. *Insurance Co.*, 124 Tenn. 450, 473-483;

Doughty v. *Grills*, 260 S.W.2d 379, 37 Tenn. App. 63, 90;

I. C. R. R. Co. v. *Rouw & Co.*, 25 Tenn. App. 475, 159 S.W.2d 839, 849;

Tabor v. *Mutual Life Ins. Co.*, (4 C.C.A.) 13 F.2d 765, 770;

Nat. Life & Acci. Ins. Co. v. *Eddings*, 138 Tenn. 512, 522,

and

Dale v. *Temple Co.*, 208 S.W.2d 344, 351, 186 Tenn. 69, holding at page 84, the rule applies as to corporations equally as to individuals.

Counts Two and Four Do Not Relate to FCC or Senate Crime Committee Records or Reports.

It appears that Petitioner is again trying to "throw up a smoke screen", as it tried to do in the Trial Court and Court of Appeals, by devoting two-thirds of its Petition to

the FCC and Senate Crime Committee hearings and reports. The award in this case was based solely on republication by the Petitioner of false and defamatory statements made by Senator Kefauver and one of his supporters, O. D. Bratton. The *entire* publications made the basis of the recovery in Counts Two and Four were in evidence, were argued, and were considered by the Court. There is no basis for any statement by Petitioner (on pages 7 & 8) that the entire publications were not considered. There is no basis for all of the reference to the FCC and Senate Crime Committee Reports, because Counts Two and Four do not involve them. In the publication in Count Two republishing Senator Kefauver's remarks the Petitioner indulged in some punctuation which Judge Miller at page 53 of his opinion in 201 F. Supp. stated, "By use of the two dashes, the defendant parenthesized and isolated the words . . . leaving the remainder of the sentence to refer only to the plaintiff Venn." *This was the action of the newspaper itself in its reporting of the speech.*

No Plea of Guaranty of Free Speech

As to one publication on August 6, 1954, which was not made the basis of a recovery, the Petitioner did plead unqualified privilege "and guaranteed as a constitutional right as freedom of the press" (Par. 29 Appellant's Appendix in Court of Appeals, page 27a). No such plea was even filed as to the publications of July 15, 1954 and July 17, 1954, the publications set out in Counts Two and Four. Respondent submits that such a contention as to Counts Two and Four is a pure after-thought, and is now raised solely to try and inject a constitutional question which Petitioner apparently did *not* feel was involved when it filed its pleas. This it should not be permitted to do.

Publications Are Libelous Per Se, and Damages

As hereinabove noted, Petitioner apparently attempts to state the case should be dismissed because no special damages were found by the Trial Judge. The publications were found to be *libelous per se*. As to this Judge Miller said on pages 54 and 55 of his reported opinion:

> "Words injurious upon their face without the aid of extrinsic proof are defamatory *per se*. *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196, 147 S.W.2d 406; *Hinson* v. *Pollock*, 159 Tenn. 1, 3, 15 S.W.2d 737; *Wilson* v. *Gadd*, 4 Tenn. App. 582, 586; *Mattson* v. *Albert* 97 Tenn. 232, 234.
>
> "Libels on private persons have been thus classified: (1) Libels which impute to a person the commission of a crime; (2) Libels which have a tendency to injure him in his office, profession, calling, or trade; and (3) Libels which hold him up to public scorn and ridicule *Hinson* v. *Pollock*, *supra*, 159 Tenn. at p. 3. The present case falls in the last two categories.
>
> "Both publications (July 15 and July 17) referred to the plaintiff and his principal activity, the television talkathon. In the field of public relations and publicity, and particularly in the political area, where the spotlight is turned relentlessly not only upon the candidate himself, but also upon the background, reputation and standing of those with whom the candidate is identified, anyone seeking favorable publicity and public support would naturally shun and avoid all contact or association with persons identified or connected with mobsters, underworld characters, gamblers and other nefarious characters. The plaintiff's business activity was that of producing television talkathons for candidates for public office. Statements or imputations that a person so engaged was connected with such elements and characters, when effectively and convincingly presented to the public, would of necessity injure such person's business and occasion him

pecuniary loss. The statements are therefore libelous *per se*. *Smith* v. *Fielden*, 205 Tenn. 313, 320; *Fry* v. *McCord Bros.*, 95 Tenn. 678, 684. *Bank* v. *Bowdre Bros.*, *supra*, 92 Tenn. at p. 736; *Dupont Engineering Co.* v. *Nashville Banner Pub. Co.*, M.D. Tenn., 1925, 13 F.2d 186, 192; *Hartsell* v. *Depew*, 10 Tenn. App. 141, 143; Restatement, Torts, Sec. 573; 33 Am. Jur., Libel and Slander, Sec. 5.

"A person may be defamed by a statement that he associates with persons of notoriously disreputable character or by attributing to him the characteristics of literary or historical figures of ill repute. Restatement, Torts, Sec. 565; *Gearhart* v. *WSAZ, Inc.*, E.D. Ky., 1957, 150 F. Supp. 98, 109, aff'd 254 F.2d 242. The publications here considered would naturally tend to bring the plaintiff into contempt, ridicule and disgrace and thus deprive him of the comforts of society. It is well settled that such publications are *libelous per se*. *Gearhart* v. *WSAZ, Inc.*, *supra*, 150 F. Supp. at p. 109; *Hartsell* v. *Depew*, *supra*, 10 Tenn. App. at p. 143; Restatement, Torts, Sec. 565.

"The general rule is that publications that are libelous *per se* are presumed to be false, 33 Am. Jur., Libel and Slander, Sec. 274, a rule which obtains in Tennessee. *Hinson* v. *Pollock*, *supra*, 159 Tenn. at p. 3. But in addition to this legal presumption the entire record in this case affirmatively establishes the falsity and inaccuracy of the statements contained in the articles of July 15 and July 17 with respect to the plaintiff Venn."

In *Bank* v. *Bowdre*, (1893) 92 Tenn. 723, the Court held at page 726:

"Defamatory words, falsely spoken of a party, which prejudice such party in his profession or trade or business, are actionable in themselves, without proof of special damages."

Other Tennessee cases to the same effect are: *Anderson* v. *Featherly*, (1915 Tenn. C.C.A.) 6 Higgins 94, 99; *Hackey* v. *Metropolitan Life Ins. Co.*, (1943) 26 Tenn. App. 564, 174 S.W.2d 575; *duPont Engineering Co.* v. *Nashville Banner Pub. Co.*, (M.D. Tenn. 1926) 13 F.2d 186, and other cases therein cited.

We again refer to *Peck* v. *Tribune Co.*, *supra*, and the memorable opinion of Mr. Justice Holmes in a case where no special damages were proved. In the Peck case, a nurse, under her own name, endorsed defendant's malt liquor. Through an error, the defendant used plaintiff's picture instead of the picture of the nurse. The defense was that plaintiff could not be damaged since anyone who knew her would know it was the nurse and not she who used and endorsed the liquor. The trial court directed a verdict for defendant. Mr. Justice Holmes reversed, observing that many readers might recognize her face without knowing her name, others think that she had sanctioned the ad under an alias. The lower courts had held for defendant on the ground that there is no general consensus that to drink whiskey or to be a nurse is wrong. Mr. Justice Holmes held the question for the jury, and held the applicable rule to be:

> "If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.
>
> "We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to

do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride."

214 U.S. at 190; 29 S. Ct. at 556; 53 L. Ed. at 962. See also *Restatement, Torts*, Sec. 559 (e) (19).

The Decisions Cited in the Petition

The Petition at pages 3, 4 and 5 cites decisions of this Honorable Court, which the Petitioner says are in opposition to this present decision or which lay down rules of law which, if applied, call for a dismissal of the suit. At pages 34 and 35 are cited Courts of Appeals decisions which the Petition states (in italics as shown) are "*all directly in point* and are all *contrary* to the decision sought to be reviewed." Nothing could be further from the truth. For this reason we will summarize these cases.

The first case cited is that of *Barr* v. *Mateo et al.*, 360 U.S. 564, 79 S. Ct. 1335. This was a libel suit against the Acting Director of the Office of Rent Stabilization. It was based on a press release by Mr. Barr, made in his official capacity. The question for decision was that of absolute privilege, which is not here involved. The language quoted on page 3 of the Petition does not remotely touch the situation in the present case.

The statement is made at page 4 that this "decision is in direct opposition to this Court's opinion in *Washington Post Co.* v. *Chaloner*, 250 U.S. 290." In that case, the publication was that the plaintiff shot and killed a man in his own home while the man was abusing his own wife who had taken refuge in the home of the plaintiff. The Court held that a mere statement that a man killed another is not

a charge of the commission of a crime, is not *libelous per se*, and the addition of the other words did not make it so. The Court cited with approval an opinion by Judge Lurton, when on the bench of the Sixth Circuit Court of Appeals (in *Commercial Publishing Co.* v. *Smith*, 149 Fed. Rep. 704), where he laid down the rule that where the language complained of is clear and unambiguous, it is the duty of the court to determine whether it is actionable, either *per se* or *per quod*, but where it is ambiguous, of doubtful import, or susceptible of two or more interpretations, its actionability must ordinarily be decided by the jury under appropriate instructions from the court, or by the court as the finder of the facts in the absence of a jury.

The foregoing rule is recognized in the Chaloner case as having been established in the case of *Peck* v. *Tribune Co.*, 214 U.S. 185, 190. We will again mention this Peck case hereinafter.

The Chaloner case is not, as Petitioner states, "in direct opposition" to the decision in this case. In fact, in the Court of Appeals, we cited the Chaloner case (page 30 of Brief in that Court) in support of the rule that a publication must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.

On page 4, Petitioner cites the Tennessee case of *Sweeney* v. *Newspaper Print Corp.*, 177 Tenn. at p. 200, presumably in support of the proposition that since special damages were not found and allowed, this suit should be dismissed. As shown by the quotation, the finding in the Sweeney case is that the language used was not *libelous per se*. In this case at bar, the language used *was* found to be *libelous per se*, in which case it is not necessary to prove special damages to support a recovery.

On page 5, the Petitioner cites three cases which it contends state reasons for the importance of this case and the granting of the writ. The first is the case of *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 75 S. Ct. 614. It is amazing to the writers hereof that Petitioner would cite this Rice case. We contend that the principle announced in the Rice case is governing here, namely, that to grant the writ sought would be improvident. The Rice case was a suit for damages for mental suffering, claimed to flow from the refusal of the defendant to allow the burial of the Indian husband of the plaintiff in its cemetery. A writ of certiorari was granted. A petition to rehear was thereafter granted and this court dismissed the writ saying it had been improvidently granted. The Court said the Rice case was not one in which there are "special and important reasons" as required by Rule 19 (page 74 of opinion). This Court also said on page 74: "Nor does it (this Court) sit for the benefit of the particular litigants." This Court further stated (p. 79) that it should "be consistent in not granting a writ of certiorari except in cases involving principles, the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeal." Respondent submits that these governing rules dictate the denial of the present writ sought.

The next case is *In re Murchison et al.*, 349 U.S. 133, 75 S. Ct. 623, and involved a judge sitting as a "one-man jury" and who also heard the case arising from his inquiry and holding the Petitioners in contempt of court. The issue involved was one of due process and "a fair trial in a fair tribunal" (at page 136). The Petitioner in this case has not claimed any violation of the due process clause or that it did not get "a fair trial in a fair tribunal." The

citation of the Murchison case in support of this present Petition is meaningless.

The Petitioner then cites *Williams* v. *Georgia*, 349 U.S. 375, 75 S. Ct. 814, and it involved racial discrimination in the selection of the jury. In oral argument, the Attorney General of Georgia admitted a denial of equal protection, but said the question had been raised too late. The case was remanded to the State Supreme Court for reconsideration. The facts and the opinion have no application to the case here involved. The quotation on page 5 of the petition is actually from *Patterson* v. *Alabama*, 294 U.S. 600, which this Court said involved "identical substantive facts" (at page 389).

Not one of the cited cases states reasons for the granting of the writ sought. On the contrary, sound reasons are stated for denying the writ.

At page 34 of the Petition, there are cited three "recent decisions of various federal Courts, *all directly in point*, and all *contrary* to the decision sought to be reviewed." The only correct thing stated is that the decisions are actually recent decisions. The first case cited is that of *Wallingford* v. *Zenith Radio Corp.*, (7th Cir.) 310 F.2d 693. In this case, the judgment for the defendant was affirmed. The complaint of the plaintiff charged that the defendant was a field representative of a post graduate medical education department at the University and was a vendor of hearing aids. The court held that this wording was not *libelous per se*. Neither the facts nor the opinion have any bearing on the present case.

The second case cited is that of *Hogan* v. *New York Times Co.*, (2nd Cir.) 313 F.2d 354. This is a libel action for a publication of a defamatory article concerning the actions of the plaintiffs, who were policemen, in the making

of a raid on a dice game. The headline in the article described the raid as following "The Script of a Keystone Comedy." A jury verdict of over $6,000 was returned for both plaintiffs and the Second Circuit Court of Appeals *affirmed*, holding the defense of qualified privilege was properly for the jury. Also, the court said at page 356:

> "But in addition, we hold that the plaintiffs were entitled to go to the jury on the issue of reckless disregard of the truth."

This last quote is particularly applicable to the case involved. In fact, this Hogan case is direct authority to deny this Petition rather than grant it.

The third case cited, which Petitioner says is directly in point, and contrary to the decision sought to be here reviewed, is that of *Brownfield* v. *Landon*, (D.C.) 307 F.2d 389 (Cert. Den.). This suit was for damages because of an alleged slanderous statement made by an Air Force Inspector General at a meeting. His statements were germane to the purpose of the meeting. The court held that his statements were absolutely privileged and judgment was rendered for the defendant. There is no question of absolute privilege involved in the case at bar.

The foregoing decisions of this Honorable Court and of the three circuit courts of appeal are those relied upon by the Petitioner. The cases simply do not hold what the Petitioner states they hold, they are no authority for the granting of this petition, and, in fact, some of the cases are direct authority for the denial of it.

CONCLUSION

As pointed out hereinabove, Judge Miller, for example, found: as "false . . . the statement . . . that plaintiff was

connected with gamblers in Florida"; "that the plaintiff did not move in circles with Al Polizzi or with mobsters, gangs or members of the underworld"; and that the plaintiff was not a "tie in" with the underworld. These questions are not properly open to review in this Honorable Court. Yet, it seems the Petitioner now desires this Court so to do solely *because* it, by the so-called "The Undisputed Testimony", seeks to establish that Venn was associated with gamblers and gangsters, that he was "freely mingling, with a smiling countenance, with such underworld characters and gangsters as 'Mickey' McBride, 'Big Al' Polizzi, etc.", and that Venn was otherwise an unsavory character and a "tie in" with the underworld. Petitioner seeks to relitigate here matters not now open to review. These matters, *all decided adversely to Petitioner*, present no constitutional questions "relating to the freedom of the press, as protected by the Constitution of the United States, and Petitioner's right to publish, without malice, *political news* arising out of issues involved in a contest for the Democratic nomination to the United States Senate . . .".

The case has been correctly decided and the writ should be denied.

Respectfully submitted,

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